Supreme Court, U.S.
FILED
APR 11 2016
OFFICE OF THE CLERK

No. 15-674

# In the Supreme Court of the United States

UNITED STATES OF AMERICA, ET AL., PETITIONERS

*v.*

STATE OF TEXAS, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE FIFTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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## TABLE OF CONTENTS


Page

I. Respondents lack Article III standing ..... 2
A. None of respondents' theories satisfies Article III ..... 2
1. Self-generated costs ..... 2
2. Social services costs ..... 6
3. *Parens patriae* ..... 8
4. "Special solicitude" ..... 8
B. Respondents' theories would fundamentally transform Article III ..... 9
II. Respondents lack a cause of action ..... 11
III. The Guidance involves matters that are committed to agency discretion by law ..... 13
IV. The Guidance is lawful ..... 14
A. "Lawful presence" ..... 16
B. Social Security and tolling ..... 18
C. Work authorization ..... 21
1. The Secretary has discretion to authorize aliens to work ..... 21
2. The Secretary has discretion to authorize the aliens covered by the Guidance to work ..... 22
V. The Guidance is exempt from notice-and-comment requirements ..... 27
VI. The Take Care Clause provides no basis for relief ..... 29


## TABLE OF AUTHORITIES

Cases:


*Air Courier Conference of Am.* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991) ..... 12, 13
*Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) ..... 8
*Arizona* v. *United States*, 132 S. Ct. 2492 (2012) ..... 14

Cases—Continued: Page

*Arizona Dream Act Coal.* v. *Brewer*, No. 15-15307, 2016 WL 1358378 (9th Cir. Apr. 5, 2016) ..... 5
*Berger* v. *Heckler*, 771 F.2d 1556 (2d Cir. 1985) ..... 18
*Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979) ..... 27, 28
*Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138 (2013) ..... 1, 3, 8, 9
*DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006) ..... 1, 9, 10
*Federation for Am. Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897 (D.C. Cir. 1996), cert. denied, 521 U.S. 1119 (1997) ..... 13
*Heckler* v. *Chaney*, 470 U.S. 821 (1985) ..... 13
*Hotel & Rest. Emps. Union, Local 25* v. *Smith*, 846 F.2d 1499 (D.C. Cir. 1988) ..... 23
*Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Peters) 524 (1838) ..... 30, 31
*Lincoln* v. *Vigil*, 508 U.S. 182 (1993) ..... 14, 29
*Linda R.S.* v. *Richard D.*, 410 U.S. 614 (1973) ..... 11
*Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) ..... 12
*Massachusetts* v. *EPA*, 549 U.S. 497 (2007) ..... 8, 9
*Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475 (1867) ..... 30
*Morton* v. *Ruiz*, 415 U.S. 1999 (1974) ..... 29
*National Mining Ass'n* v. *McCarthy*, 758 F.3d 243 (D.C. Cir. 2014) ..... 27
*Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976) ..... 3, 4
*Raines* v. *Byrd*, 521 U.S. 811 (1997) ..... 7, 11
*Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471 (1999) ..... 22, 26
*Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83 (1998) ..... 11

Cases—Continued: Page

*Texas Health & Human Servs.* v. *United States*, No. 15-cv-3851, 2016 WL 1355596 (N.D. Tex. Feb. 8, 2016) ..... 10
*V- X-, In re*, 26 I. & N. Dec. 147 (B.I.A. 2013) ..... 20
*Whitmore* v. *Arkansas*, 495 U.S. 149 (1990) ..... 5
*Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992) ..... 4
*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) ..... 30

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause ..... 4
Art. II, § 3, Cl. 5 (Take Care Clause) ..... 30
Art. III ..... *passim*
Administrative Procedure Act, 5 U.S.C. 500 *et seq.* ..... 9
5 U.S.C. 552(a)(2) ..... 29
5 U.S.C. 553(a)(2) ..... 29
5 U.S.C. 553(b)(A) ..... 29
Balanced Budget Act of 1997, Pub. L. No. 105-33, Tit. V, § 5561, 111 Stat. 638 ..... 19
Immigration Act of 1990, Pub. L. No. 101-649, Tit. III:
§ 301(g), 104 Stat. 5030 ..... 24
§ 302(a), 104 Stat. 5030 ..... 23
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ..... 2
8 U.S.C. 1103(a) ..... 12, 14, 21
8 U.S.C. 1182(a)(6)(A)(i) ..... 17
8 U.S.C. 1182(a)(9)(B) ..... 6, 12, 20, 21
8 U.S.C. 1182(a)(9)(B)(i) ..... 26

Statutes and regulations—Continued: Page

8 U.S.C. 1182(a)(9)(B)(ii) ..... 17, 19, 20, 26
8 U.S.C. 1182(a)(9)(B)(v) ..... 26
8 U.S.C. 1182(d)(5) ..... 18
8 U.S.C. 1229a ..... 17
8 U.S.C. 1231(i) ..... 9, 13
8 U.S.C. 1254(e) (1988 & Supp. II 1990) ..... 23
8 U.S.C. 1254a ..... 23
8 U.S.C. 1254a(g) ..... 23
8 U.S.C. 1255(a) ..... 26
8 U.S.C. 1255(c)(2) ..... 26
8 U.S.C. 1324a(h)(3) ..... 12, 21
Immigration Reform and Control Act of 1986, 8 U.S.C. 1324a ..... 21
6 U.S.C. 202(5) ..... 14
8 U.S.C. 1611(a) ..... 18
8 U.S.C. 1611(b) ..... 19
8 U.S.C. 1611(b)(2) ..... 12, 17, 19
8 U.S.C. 1641(b) ..... 19
42 U.S.C. 405(c)(2)(B) (1988) ..... 24
42 U.S.C. 1382c(a) (1988) ..... 18
8 C.F.R.:
Section 1.3(a) ..... 17
Section 1.3(a)(4)(vi) ..... 29
Section 212.5(f) ..... 18
Section 274a.12(c)(8) (1988) ..... 25
Section 274a.12(c)(9) (1988) ..... 25
Section 274a.12(c)(14) ..... 6, 15, 21, 29
20 C.F.R.:
Section 416.1618(a) (1994) ..... 18
Section 416.1618(b)(11) (1994) ..... 18

Regulations—Continued: Page

Section 422.104(b) (1990) ..... 24
Section 422.104(c) (1990) ..... 24

Miscellaneous:

President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990) ..... 23
Dep't of Homeland Sec., *2013 Yearbook of Immigration Statistics* (Aug. 2014), https://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf ..... 26
Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) ..... 27
43 Fed. Reg. 29,258 (July 10, 1978) ..... 23
52 Fed. Reg. (Dec. 4, 1987):
p. 46,092 ..... 25
p. 46,093 ..... 22
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p. 47,040 ..... 17
p. 47,041 ..... 19
H.R. Rep. No. 78, 105th Cong., 1st Sess. (1997) ..... 19
H.R. Rep. No. 627, 100th Cong., 2d Sess. (1988) ..... 23
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Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 U.C.L.A. L. Rev. Discourse 58 (2015) ..... 17

Miscellaneous—Continued: Page

Memorandum from Donald Neufeld, Acting Assoc. Dir., to Field Leadership, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* (May 6, 2009), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF ..... 16, 17, 18, 20, 21

4 *Papers of John Marshall* (Charles T. Cullen ed., 1984) ..... 11

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Tex. Dep't of Pub. Safety, *Verifying Lawful Presence* (July 2013), http://www.tx.dps.state.tx.us/DriverLicense/documents/verifyingLawfulPresence.pdf ..... 6, 18

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13A Charles Alan Wright et al., *Federal Practice and Procedure* (3d ed. 2008) ..... 12

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## REPLY BRIEF FOR THE PETITIONERS

Respondents' challenge to the Guidance does not present an Article III case or controversy. The alleged injuries on which respondents base their claim of standing all involve indirect and incidental effects of a kind that this Court has never found sufficient to justify an exercise of the judicial power. Accepting any of respondents' proffered bases for standing would fatally compromise "the constitutional limitation of federal-court jurisdiction to actual cases or controversies," *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 341 (2006), and do violence to the "separation-of-powers principles" that serve "to prevent the judicial process from being used to usurp the powers of the political branches," *Clapper* v. *Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

If the Court reaches the merits, it should uphold the Guidance because it is a substantively and procedurally sound exercise of the Secretary's broad statu-

tory authority under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Respondents have emphasized the Guidance's scope—but now concede (Br. 39) that the Secretary has unreviewable discretion to accord *each alien it covers* a non-binding, temporary reprieve from removal. That perfectly describes deferred action. The crux of respondents' challenge to this exercise of discretion—the claim that it confers on aliens whose presence Congress has deemed unlawful the right to remain lawfully in the United States—is simply wrong. Aliens afforded deferred action remain in violation of the immigration laws, are subject to removal proceedings at any time, and gain no defense to removal. See pp. 16-18, *infra*. And respondents are wrong to insist that, even though Congress has authorized the Secretary to tolerate the ongoing presence of the parents and children at issue here, the Secretary is forbidden to authorize them to work to provide for their families while they remain here. The INA contains no such senseless restriction on the Secretary's authority.

## I. RESPONDENTS LACK ARTICLE III STANDING

### A. None Of Respondents' Theories Satisfies Article III

Respondents lack Article III standing because they have not alleged a concrete, particularized injury to a legally protected interest that is fairly traceable to the Guidance.

#### *1. Self-generated costs*

Respondents cannot establish Article III standing on the basis of the incidental effect of the Guidance on which the court of appeals relied: Texas's claim that the Guidance will lead it to incur increased expenses in subsidizing the issuance of driver's licenses.

a. Any increased subsidy costs Texas may incur provide no basis for standing because they are not fairly traceable to the Guidance. Texas has chosen to subsidize driver's licenses for all aliens within various federal immigration categories. If that choice no longer suits Texas's interests, it can make a different choice. What it cannot do is maintain the voluntary link between its fisc and federal law, and then demand that federal policy not change in a way that would indirectly increase its costs.

This is not an argument (Resps. Br. 22) that a litigant lacks standing whenever it can change its own behavior to avoid injury that a defendant's actions would otherwise inflict. The point is far narrower, but nonetheless fundamental under our system of separate sovereigns: When a State makes a voluntary choice to tie a state-law subsidy to another sovereign's actions, the State does not thereby obtain standing to sue the other sovereign whenever the latter's actions incidentally increase the cost of that subsidy.

That is the holding of *Pennsylvania* v. *New Jersey*, 426 U.S. 660 (1976), and respondents cannot distinguish it. There, as here, the State's injury was "inflicted by its own hand," and "nothing prevent[ed]" the State from changing its law to eliminate the harm. *Id.* at 664. It is irrelevant that *Pennsylvania* was an original-jurisdiction case. Article III's original jurisdiction extends only to "cases" or "controversies," and *Pennsylvania* involved neither because the alleged harm was self-generated. *Ibid.* This Court accordingly has applied *Pennsylvania* outside the original-jurisdiction context. *E.g.*, *Clapper*, 133 S. Ct. at 1151. And like Texas, Pennsylvania adopted its subsidy

before the change that prompted its suit. See *Pennsylvania*, 426 U.S. at 662-663.

*Wyoming* v. *Oklahoma*, 502 U.S. 437 (1992), is not to the contrary. Respondents suggest (Br. 25) that *Wyoming* overruled *Pennsylvania*, but it does not even mention *Pennsylvania*—doubtless because *Wyoming* did not involve self-generated injury—and this Court's reliance on *Pennsylvania* in *Clapper* demonstrates it was not overruled. In *Wyoming*, Oklahoma enacted a tax that discriminated "on its face and in practical effect" against Wyoming coal, in violation of the Commerce Clause. 502 U.S. at 441. Oklahoma utilities purchased "virtually 100%" of their coal from Wyoming, and the law's stated purpose was to reduce the use of "Wyoming coal." *Id.* at 443. *Wyoming* thus did not involve the situation—here and in *Pennsylvania*—where the plaintiff State voluntarily yoked its fisc to another sovereign's policies, and then sued to challenge those policies on the basis of their incidental costs. Like Pennsylvania, Texas lacks a legally protected, judicially cognizable interest in challenging the other sovereign's actions on such a basis.

b. To the extent that respondents assert injury to a quasi-sovereign interest in Texas not feeling "pressure" to change its policies, that alleged injury is entirely speculative, and not concrete, particularized or certainly impending. Texas's current policy is embodied in its existing laws and Department of Public Safety (DPS) policies. Texas chose to subsidize licenses for all eligible individuals, including deferred-action recipients and many others, because it believed the benefits of doing so outweigh the costs. Texas is free to alter those judgments in any number of ways.

See U.S. Br. 25-26. But Texas has not changed its policies in response to the Guidance (or in response to the 2012 DACA policy). And it is impossible to know what change, if any, the Texas legislature or DPS might make in the future, what the basis for any such change might be, or whether federal law would preempt that choice. See *Whitmore* v. *Arkansas*, 495 U.S. 149, 158 (1990) ("Allegations of possible future injury" are insufficient.); Dellinger Amicus Br. 19-24.

If Texas's legislature or DPS were to act, a concrete case or controversy could be prompted. A person denied a subsidized license (or charged a higher price) could challenge that action, and Texas could defend on the ground that its new policy is not preempted.[1] But it makes a mockery of this Court's steadfast adherence to Article III's limitations to argue that federal courts should adjudicate respondents' challenge to the Guidance in a suit against the United States in the *absence* of any change in Texas law or policy—based on speculation that Texas might someday make a change and that, if it did so, that change might be preempted.

c. Finally, respondents lack standing to press the arguments in their brief—even if the "subsidy" theory were valid. Respondents make clear (Br. 20-21) that

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[1] That is the posture of *Arizona Dream Act Coalition* v. *Brewer*, No. 15-15307, 2016 WL 1358378 (9th Cir. Apr. 5, 2016). The court there held that federal law preempts Arizona's choice to issue driver's licenses to aliens with employment authorization documents (EADs) issued because they applied for adjustment of status or for cancellation of removal, but not to aliens with EADs because of deferred action or deferred enforced departure, when "the federal government treats th[e] EADs the same in all relevant respects." *Id.* at *11. Arizona did not invoke cost to justify its choice. *Ibid.*

they do not object to deferred action (*i.e.*, notifying the alien of a non-binding and temporary reprieve, as a matter of discretion), but instead challenge only "the Executive's affirmative granting of lawful presence and work authorization." But Texas issues licenses to aliens on the basis of deferred action *itself*. Tex. DPS, *Verifying Lawful Presence* 4 (July 2013). Whether an alien is "lawfully present" for purposes of Social Security or for the three- or ten-year admissibility bars under 8 U.S.C. 1182(a)(9)(B) is irrelevant to eligibility for a driver's license. And although Texas grants licenses to aliens with work authorization, *id.* at 3, aliens can obtain work authorization via the Guidance only if they already have deferred action, 8 C.F.R. 274a.12(c)(14), and thus are eligible for a driver's license under Texas law even without work authorization. Texas therefore cannot meet Article III's redressability requirement: The same individuals would be eligible for the same license at the same price—with or without Social Security, tolling of unlawful presence, or work authorization.

***2. Social services costs***

Respondents cannot establish a cognizable Article III injury based on their more generalized allegations that the Guidance will have the incidental effect of increasing Texas's costs not only for driver's licenses, but also for education, health care, and social services.

This Court has never found such claims to be cognizable under Article III, and doing so here would utterly transform the judicial power. Federal courts would displace the political process as the preferred forum for policy disputes between individual States and the federal government because a potentially limitless class of federal actions could be said to

have incidental effects on a State's fisc. See U.S. Br. 30-33; pp. 9-11, *infra*. For example, the decision to regulate—or even not regulate—a particular drug or medical device might impose increased health care costs on a State. Similarly, if "significant law enforcement costs" can generate standing, Resps. Br. 27, then virtually any federal non-prosecution policy (such as for possessing small amounts of controlled substances) could arguably lead to increased state spending.

Under our federal system of separate sovereigns, a State has no legally protected interest in avoiding such indirect and incidental consequences of actions taken by the United States in regulating individuals' conduct pursuant to the powers vested in it by the Constitution. U.S. Br. 22-23. This Court has accordingly never recognized such claims as "legally and judicially cognizable." *Raines* v. *Byrd*, 521 U.S. 811, 819 (1997). And it would be especially inconsistent with the constitutional structure to allow such claims to proceed when they involve immigration. A State lacks authority to interfere with federal immigration policies because, under the Constitution and the INA, formation of immigration policies is committed to the national government on the basis of the interests of the Nation as a whole, even though those policies may have significant indirect effects on the State.

Furthermore, as the district court found, respondents' allegations of social-services costs are "too speculative to be relied upon by this or any other court." Pet. App. 313a. Those asserted costs flow from aliens' mere presence in the State. *Ibid.* To find that the Guidance will incidentally increase them, the Court would have to conclude that the parents and children

here would leave this country in sufficient numbers to materially reduce those costs, if the Guidance were invalidated. But as respondents recognize (Br. 39), the Department of Homeland Security (DHS) has separately (and validly) exercised its discretion to make these individuals non-priorities for removal. These individuals have lived in this country for years and are particularly unlikely to depart voluntarily, leaving their children behind. And work authorization naturally ameliorates need for state services, and thus should reduce the pressure on the State's fisc. Respondents' alleged social-services costs thus are exceedingly unlikely, not "certainly impending." *Clapper*, 133 S. Ct. at 1147.

**3. Parens patriae**

Respondents' *parens patriae* argument (Br. 30-31) is meritless: "A State does not have standing as *parens patriae* to bring an action against the Federal Government." *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982).

***4. "Special solicitude"***

Respondents cannot overcome these obstacles to standing by invoking the "special solicitude" for States referred to in *Massachusetts* v. *EPA*, 549 U.S. 497, 520 (2007). Respondents have not asserted a judicially cognizable "quasi-sovereign interest" protected by a specific "procedural right"—the two considerations *Massachusetts* identified as necessary for its ruling. *Ibid.* The sovereign interest in protecting sovereign territory is well-settled. *Id.* at 519. But third parties generally lack a legally protected interest in enforcement of the immigration laws against others, or the provision of benefits to others. And

although Congress can provide States protection against certain indirect costs of immigration policies, *e.g.*, 8 U.S.C. 1231(i), Congress has not created protection for States against the incidental impacts asserted here.

The generic cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, is also no substitute for the necessary conditions for standing in *Massachusetts*. It would have made little sense for this Court to attach "critical importance" to Congress's creation of a particular procedural right, *Massachusetts*, 549 U.S. at 516, if the APA already made that right available generally. And respondents' approach would allow States to bring claims to "vindicate the public's nonconcrete interest in the proper administration of the laws," notwithstanding this Court's assurance that such suits would not be "entertain[ed]." *Id.* at 516-517.

**B. Respondents' Theories Would Fundamentally Transform Article III**

The limitation of the judicial power to cases and controversies "is crucial in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler*, 547 U.S. at 341. But respondents' theories would expand the judicial power far beyond its circumscribed boundaries, and create precisely the risk of usurpation of the power of the political Branches that Article III forbids. See *Clapper*, 133 S. Ct. at 1146.

In response, the most respondents can say (Br. 34) is that Article III's injury-in-fact and causation requirements would make it "much more difficult" to challenge grants of immigration relief in individual cases. But respondents do not deny that their theory

*would* give a State standing to challenge any policy affecting any significant group of aliens—challenges that are the *most likely* to interfere with sensitive foreign policy imperatives and pressing humanitarian concerns.

In respondents' view, individual States could have challenged the federal government's decision to admit or parole thousands of Cubans fleeing the Castro regime in the 1960s or thousands of Vietnamese fleeing a Communist takeover in the 1970s, to provide safe harbor to thousands of Chinese who feared returning to their country after Tiananmen Square in the 1990s, or to issue any other consequential immigration policy. See U.S. Br. 31. This risk is not hypothetical, as Texas has sued the United States to block the settlement of Syrian refugees in the State. See *Texas Health & Human Servs. Comm'n* v. *United States*, No. 15-cv-3851, 2016 WL 1355596 (N.D. Tex. Feb. 8, 2016).

Respondents' theory of standing would also permit States to challenge changes to the federal definition of "disabled veteran," "adjusted gross income," or "poverty," or any other federal standard—so long as the State has linked its fisc to that standard. U.S. Br. 32. Indeed, if the Court were to find standing based on incidental impacts on the state treasury even without such a link, virtually any change in federal policy could prompt an Article III dispute. The judicial power would then extend to "almost every subject on which the executive could act," "[t]he division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary." *DaimlerChrysler*, 547

U.S. at 341 (quoting 4 *Papers of John Marshall* 95 (Charles T. Cullen ed., 1984)).

Respondents suggest (Br. 34-35) that there is no need to worry because a plaintiff also must be within the zone of interests to sue, and suits must ultimately have merit. That is cold comfort, given that respondents also argue (Br. 37-38) that States are *always* within the INA's zone of interests and that anyone who wants to comment in an administrative proceeding can assert a cognizable notice-and-comment claim. The *merits* of a case are also no answer to an overreach of *jurisdiction*, as Article III's limitations "are an essential ingredient of separation and equilibration of powers." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101 (1998).

Rather than deal seriously with the Judiciary's properly limited role in our system of government, respondents seek to stoke "the natural urge to proceed directly to the merits of this important dispute and to 'settle it' for the sake of convenience and efficiency." *Raines*, 521 U.S. at 820. That is precisely what this Court's precedents caution against, and respondents' claims should be dismissed.

## II. RESPONDENTS LACK A CAUSE OF ACTION

A. Respondents' alleged injuries are far outside the "zone of interests" of any relevant statute. Respondents acknowledge that they "lack[] a judicially cognizable interest in the prosecution or nonprosecution of another." Br. 20 (quoting *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973)). They are therefore outside the zone of interests of decisions regarding deferred action itself, *i.e.*, notifying an alien of a non-binding, temporary decision to forbear. And respondents' claims about deferred action's consequences are even

further afield: Title II Social Security is a *federal* benefit paid from federal taxes on the alien's earnings, 8 U.S.C. 1611(b)(2); tolling of "unlawful presence" is solely relevant to determining whether an alien is admissible under federal immigration law, 8 U.S.C. 1182(a)(9)(B); and authorization for an alien to be lawfully employed, 8 U.S.C 1103(a), 1324a(h)(3), is unrelated to state-law expenses for driver's licenses and social services. Indeed, respondents do not seriously contend that they have a stake in whether the federal government accords *others* such treatment.

Respondents instead contend that different injuries are within the "zone of interests." But they do not dispute that "the same interest must satisfy both" Article III and the zone-of-interests test. 13A Charles Alan Wright et al., *Federal Practice and Procedure* § 3531.7, at 513 (3d ed. 2008). "[T]he plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

B. Respondents' assertion of these additional injuries also fails on its own terms Respondents contend (Br. 37) that they fall within the zone of interests of the INA as a whole because States bear indirect costs associated with immigration. But this Court has refused "to accept th[at] level of generality in defining the 'relevant statute.'" *Air Courier Conference of Am.* v. *American Postal Workers Union, AFL-CIO*, 498 U.S. 517, 529-530 (1991). And respondents fail to identify a particular statutory provision under which they are "aggrieved." They have never asserted a

claim under the few INA provisions that take account of incidental financial impacts and allow States to seek reimbursement. *E.g.*, 8 U.S.C. 1231(i). Otherwise, the INA does not "even hint[] at a concern about [the] regional impact" of federal immigration policy. *Federation for Am. Immigration Reform, Inc.* v. *Reno*, 93 F.3d 897, 899, 901 (D.C. Cir. 1996), cert. denied, 521 U.S. 1119 (1997) (prospect that aliens may "diminish[] employment opportunities" or "crowd[] public schools and other government facilities and services" does not fall within the INA's zone of interests).

Nor does Section 1324a encompass a State interest in guarding citizens against "labor-market distortion." Resps. Br. 37. That provision does not depart from the background rule that States cannot sue the federal government as *parens patriae*. See p. 8, *supra*.

Similarly, litigants do not gain an APA cause of action simply because they wish to comment on agency rulemaking. That approach would deprive the zone-of-interests test "of virtually all meaning." *Air Courier Conference*, 498 U.S. at 529-530. See U.S. Br. 35.

## III. THE GUIDANCE INVOLVES MATTERS THAT ARE COMMITTED TO AGENCY DISCRETION BY LAW

Respondents agree (Br. 38-39) that, under *Heckler* v. *Chaney*, 470 U.S. 821 (1985), they cannot impair "the Executive's enforcement discretion," and that the Executive remains free "to issue 'low-priority' identification cards to aliens." That perfectly describes deferred action itself, and effectively abandons any challenge to the Guidance to that extent.

*Heckler* does not address the consequences that flow from non-enforcement discretion, such as the possible receipt of Social Security benefits. But the government is not relying (Br. 39-41) on *Heckler* to

bar review of the Guidance on account of its consequences. The government is arguing that the consequences do not make the Guidance reviewable because *the Guidance does not change them*—they flow from preexisting statutes, regulations, and policies. Furthermore, the government's preexisting policies regarding those consequences are themselves committed to agency discretion, not because of *Heckler* but because the relevant "provisions furnish 'no meaningful standard against which to judge the [Secretary's] exercise of discretion.'" U.S. Br. 36 (quoting *Lincoln* v. *Vigil*, 508 U.S. 182, 191 (1993)).

## IV. THE GUIDANCE IS LAWFUL

The Guidance is a lawful exercise of the Secretary's broad authority to "[e]stablish[] national immigration enforcement policies and priorities," 6 U.S.C. 202(5), and perform such acts as "he deems necessary for carrying out his authority" to "administ[er]" the INA, 8 U.S.C. 1103(a). These capacious grants of authority reflect Congress's judgment that the Executive has a particular need for flexibility to balance pressing, often conflicting, and rapidly evolving resource, foreign-relations, national-security, and humanitarian imperatives in the immigration context. See *Arizona* v. *United States*, 132 S. Ct. 2492, 2499 (2012) ("A principal feature of the removal system is the broad discretion exercised by immigration officials").

Respondents fail to come to terms with the nature of the Secretary's statutory authority or the history of its exercise. Respondents acknowledge (Br. 38-39) that the Secretary has unreviewable authority to notify each person covered by the Guidance that he or she will receive a non-binding, temporary reprieve. But respondents nonetheless assert that Congress has

drawn the line at non-enforcement of removal, and has denied the Secretary the authority to deal with the real-world consequences of his choices. But since 1960, the Executive has established more than 20 policies for according deferred action (or similar forms of discretion) to large groups of aliens living in the United States, including the Family Fairness policy that covered as many as 1.5 million people—and all of those policies enabled aliens to work lawfully. See U.S. Br. 48-57. Indeed, since 1981, regulations have reflected the commonsense proposition that aliens who may remain in this country, as a matter of the Executive's discretion, also should be able to lawfully make ends meet for themselves and their families. 8 C.F.R. 274a.12(c)(14). And Congress has repeatedly ratified the government's position that deferral of enforcement and work authorization go hand in hand. See U.S. Br. 50-57.

Respondents are fundamentally wrong to claim that the Guidance confers on aliens whose presence Congress has deemed unlawful the right to remain lawfully in the United States. Aliens covered by the Guidance, like all aliens afforded deferred action, are violating the law by remaining in the United States, are subject to removal proceedings at the government's discretion, and gain no defense to removal. See pp. 16-18, *infra*. Deferred action itself reflects nothing more than a judgment that the aliens' ongoing presence will be tolerated for a period of time, based on enforcement priorities and humanitarian concerns, and work authorization enables them to support themselves while they remain. If Congress believes that the Secretary's authority should not be exercised in this manner, Congress is free to enact legislation to

channel or constrain that authority—as Congress has occasionally done in the past with respect to some other exercises of immigration discretion by the Executive. But Congress has not done so in any way that is relevant here, and there is no basis in existing law to deny the Secretary the authority to implement the Guidance.

**A. "Lawful Presence"**

1. Respondents' principal challenge to the Guidance proceeds from a mistaken premise. Respondents insist (*e.g.*, Br. 17) that the Guidance "declares" unlawful conduct to be lawful. But the Guidance does no such thing. Respondents primarily rely on a single sentence in the Guidance, which states that "[d]eferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States." Pet. App. 413a. That sentence is purely descriptive and has no operative, legal effect. *Ibid.* Deleting it would not change the Guidance at all.

2. "Lawful presence" in immigration law is fundamentally different from lawful *status* under the INA. See U.S. Br. 38-39; Memorandum from Donald Neufeld, Acting Assoc. Dir, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* 9-11 (May 6, 2009) (*Unlawful Presence Guidance*). Aliens with lawful *status* under the INA are here lawfully; their presence therefore is not a basis for removal. By contrast, mere "lawful presence" occurs when the Executive "openly tolerate[s] an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the

agency's discretion)," notwithstanding that the alien lacks lawful status and is present in violation of law. J.A. 76; see U.S. Br. 38-39; *Unlawful Presence Guidance* 9-11. "Lawful presence" thus might be better called "tolerated presence." Even with deferred action and "lawful presence," aliens lack lawful status, are actually present in violation of law, are subject to enforcement at the government's discretion, and gain no defense to removal. 8 U.S.C. 1229a; see 8 U.S.C. 1182(a)(6)(A)(i), 1227(a)(1)(B); see also Pet. App. 413a, 416a-417a; *Unlawful Presence Guidance* 42 ("does not make the alien's status lawful"). The Guidance changes none of that.

Moreover, there is no overarching and unified concept of "lawful presence" that triggers a "coherent, aggregated package of ancillary 'benefits.'" Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 U.C.L.A. L. Rev. Discourse 58, 66 (2015). Congress instead has used "lawful presence" in a technical sense in specific provisions to allow the Secretary to decide which categories of aliens should qualify for particular consequences. Aliens who the Secretary determines are "lawfully present" within the meaning of 8 U.S.C. 1611(b)(2) may receive Social Security benefits. But the regulatory definition of that term is relevant "[f]or the purposes of [those benefits] only," 8 C.F.R. 1.3(a), and does not "confer any immigration status or benefit under the [INA]," 61 Fed. Reg. 47,040 (Sept. 6, 1996). Similarly, the separate definition of "unlawfully present" for accruing time towards the inadmissibility bars applies only "[f]or purposes of th[at] paragraph." 8 U.S.C. 1182(a)(9)(B)(ii). Aliens thus can be "lawfully

present" for one purpose but not the other. Aliens with pending applications for temporary protected status (TPS), for example, toll accrual of unlawful presence but cannot receive Social Security benefits. *Unlawful Presence Guidance* 7; see 8 C.F.R. 1.3(a). Notably, Texas itself uses "lawfully present" in just this way—to identify categories of aliens eligible for a benefit (*i.e.*, a driver's license), including many who lack lawful *status*. *Verifying Lawful Presence* 1-5.[2]

**B. Social Security And Tolling**

1. The Guidance does not "flout[] Congress's 1996 decision to eliminate most federal benefits for unlawfully present aliens." Resps. Br. 47. DHS's regulations respect that decision. Before 1996, aliens with deferred action could receive most federal benefits because they were "permanently residing in the United States under color of law" (PRUCOL). *E.g.*, 42 U.S.C. 1382c(a) (1988); 20 C.F.R. 416.1618(a) and (b)(11) (1994). But courts interpreted PRUCOL expansively also to include aliens *without* deferred action, if the government merely did not contemplate removing them. See *Berger* v. *Heckler*, 771 F.2d 1556, 1575-1578 (2d Cir. 1985). In 1996, Congress prohibited aliens from receiving most federal benefits unless they are "qualified." 8 U.S.C. 1611(a). Aliens with

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[2] Respondents' claim (Br. 11-12) that DAPA "triggers" access to advance parole is incorrect. The Guidance does not establish any advance parole policy or grant advance parole to anybody. The Secretary "may" grant parole (and advance parole) to immigrants without regard to deferred action or any "lawful presence." 8 U.S.C. 1182(d)(5); 8 C.F.R. 212.5(f). While DHS has been permissive in authorizing travel by DACA recipients via advance parole, no such policy determination has been made with respect to DAPA.

deferred action—including under the Guidance—are not "qualified," see 8 U.S.C. 1641(b), and thus can no longer receive most federal benefits.

At the same time, however, Congress created an express exception from that bar: Non-"qualified" aliens may receive Title II Social Security benefits if they are "lawfully present in the United States as determined by the Attorney General." 8 U.S.C. 1611(b)(2). The Immigration and Naturalization Service (INS) immediately promulgated regulations specifically providing that aliens with deferred action are "lawfully present" for this purpose—but that an alien "may not be deemed to be lawfully present solely on the basis of the [INS's] decision not to, or failure to," pursue removal. 61 Fed. Reg. at 47,041. The INS thus included deferred action, but made fewer aliens eligible for Social Security and cut back on judicial interpretations of PRUCOL.

The next year, Congress ratified the INS's definition of "lawful presence" by amending Section 1611(b) also to allow non-"qualified" aliens to receive Medicare and Railroad Retirement benefits with the same proviso that they be "lawfully present in the United States as determined by the Attorney General." Balanced Budget Act of 1997, Pub. L. No. 105-33, Tit. V, § 5561, 111 Stat. 638. Congress thus added the same language to the same subsection of the same statute to "clarify that, despite general restrictions on Federal benefits for 'non-qualified' aliens, certain benefits * * * are to remain available to those who earned them through work." H.R. Rep. No. 78, 105th Cong., 1st Sess. 94 (1997). That powerfully supports the government's interpretation.

2. Respondents similarly argue (Br. 49-50) that deferred action cannot toll accrual of "unlawful presence" for purposes of the three- and ten-year bars in 8 U.S.C. 1182(a)(9)(B). Section 1182(a)(9)(B)(ii) provides that an alien is "deemed" to be "unlawfully present" when he is present "after the expiration of the period of stay authorized by the [Secretary] or is present * * * without being admitted or paroled." 8 U.S.C. 1182(a)(9)(B)(ii). Respondents do not dispute that deferred action is an authorized "period of stay." But noting that deferred action is not an "admi[ssion] or parole[]," they contend (Br. 50) that "[t]he disjunctive second clause" forecloses DHS's interpretation.

Respondents are incorrect. The first clause addresses how an alien's presence should be "deemed" *after* expiration of a period of stay, not *during* such a period. DHS sensibly construes Section 1182(a)(9)(B) as a whole not to deem an alien "unlawfully present" during an authorized stay, regardless of whether he was previously "admitted or paroled." See *Unlawful Presence Guidance* 22. Otherwise, "unlawful presence" would accrue when an alien's presence is actually lawful. For example, asylum is a lawful status, but it does not constitute an "admission" (or parole). *In re V- X-*, 26 I. & N. Dec. 147, 150-152 (B.I.A. 2013). On respondents' view, aliens who entered without inspection then received asylum would still accrue "unlawful presence"—notwithstanding that they actually have lawful status. That would make little sense.

3. Even if DHS impermissibly interpreted "lawful presence" in the Social Security or tolling provisions, that would provide no basis for enjoining *the Guidance*. The Guidance does not change those interpretations. If respondents disagree with those determina-

tions, they should petition for rulemaking—or at most a court, in a case properly before it, could declare that those interpretations are invalid. Indeed, the accrual issue only matters for individuals who entered unlawfully (*i.e.*, without being "admitted or paroled") and obtain deferred action before their 19th birthday—a sliver of the population covered by the Guidance. And the inadmissibility bar is only triggered if a person "depart[s]." 8 U.S.C. 1182(a)(9)(B); *Unlawful Presence Guidance* 16-17.

### C. Work Authorization

#### *1. The Secretary has discretion to authorize aliens to work*

Since 1981, federal regulations—adopted pursuant to the Secretary's broad authority under 8 U.S.C. 1103(a)—have provided that any alien with deferred action may apply for work authorization based on economic need. 8 C.F.R. 274a.12(c)(14). The Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a, subsequently reinforced that regulation, providing that aliens may be authorized to work "by th[e] [INA] *or by the [Secretary].*" 8 U.S.C. 1324a(h)(3) (emphasis added).

Respondents nonetheless argue (Br. 56) that IRCA "repudiated" the Executive's position that it may authorize aliens to be employed. Specifically, they posit (Br. 52-53 n.42) that "by the [Secretary]" refers only to categories of aliens for whom the INA itself directs that "the Executive either must or may separately grant work authorization." But Congress would not have attempted to repudiate the Attorney General's settled position that he can authorize aliens to work by enacting a law expressly providing *that he*

*can do just that.* The INS long ago rejected respondents' interpretation, concluding instead that IRCA ratified the INS's prior view. 52 Fed. Reg. 46,093 (Dec. 4, 1987). That longstanding interpretation warrants deference. U.S. Br. 54-55.

Respondents are equally wrong to argue (Br. 51 n.39) that DHS's regulation specifically allowing aliens with deferred action to apply for work authorization is valid only for "the four categories of deferred-action recipients that Congress made eligible for work authorization," and that this argument is timely because it did not accrue until now. When that regulation was promulgated in 1981 and repromulgated in 1987, deferred action was *exclusively* accorded "without express statutory authorization." *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 484 (1999) (*AADC*). The statutes mentioning "deferred action" were enacted beginning in 2000. See U.S. Br. 58-59. In respondents' view, DHS's regulation thus applied to a null set for nearly 20 years. That cannot be correct.

***2. The Secretary has discretion to authorize the aliens covered by the Guidance to work***

a. Since 1960, the government has established more than 20 policies for exercising discretion via deferred action or similar practices, for aliens in defined categories, and all of those policies enabled aliens to work lawfully. See U.S. Br. 48-57. Respondents contend (Br. 54-55) that Congress has systematically curtailed DHS's authority by amending the parole and voluntary departure statutes and codifying TPS. But none of those changes are relevant here.

First, none of the government's examples involved parole. They involved deferred action, deferred en-

forced departure (DED), and extended voluntary departure (EVD) for aliens who were already living here. See U.S. Br. 48-50. Second, Congress established TPS to codify DHS's discretionary practice of providing safe haven on a nationality basis, instituting a "more formal and orderly mechanism." H.R. Rep. No. 627, 100th Cong., 2d Sess. 4 (1988); see Immigration Act of 1990 (IMMACT), Pub. L. No. 101-649, Tit. III, § 302(a), 104 Stat. 5030 (8 U.S.C. 1254a). In codifying (not repudiating) that practice, Congress confirmed that the Secretary otherwise possessed the requisite authority. And although Congress made TPS the exclusive basis for providing nationality-based safe harbor, 8 U.S.C. 1254a(g), Congress did *not* restrict the Executive's discretion to provide similar relief for different or additional reasons. U.S. Br. 49 n.9; see President George H.W. Bush, Statement on Signing the Immigration Act of 1990 (Nov. 29, 1990).

Third, there would have been no reason for Congress to amend the voluntary departure statute in 1996 to stop the Executive from using EVD. Resps. Br. 54. By then, the Executive *had already stopped*. *Id.* at 55. The Executive instead used DED and deferred action, which Congress did not curtail.[3]

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[3] EVD is also different from "voluntary departure" under 8 U.S.C. 1254(e) (1988 & Supp. II 1990). That statute allowed aliens "under deportation proceedings" to "depart voluntarily" "in lieu of deportation." *Ibid.* EVD was accorded without regard to whether deportation proceedings were underway and enabled aliens to remain without departing. *E.g.*, J.A. 213-215. The INS's EVD regulations accordingly identified Section 1103(a) as the authority. See 43 Fed. Reg. 29,258 (July 10, 1978); accord *Hotel & Rest. Emps. Union, Local 25* v. *Smith*, 846 F.2d 1499, 1510 (D.C. Cir. 1988) (en banc) (Mikva, J.); *id.* at 519 (Silberman, J.) ("extra-statutory").

b. Respondents contend (Br. 56-57) that IRCA's "one-time legalization program" does not imply power "to create precisely the sort of magnet for unlawful immigration that Congress sought to avoid." But the Guidance is not a legalization program. Unlike IRCA, it does not confer lawful status; it provides only a non-binding, temporary reprieve as a matter of discretion. Nor is it a magnet: It reaches only aliens who have already lived here since 2010, and frees up resources for increased border enforcement. U.S. Br. 47.

Legislation and experience after IRCA further confirm that the Guidance is lawful. The INS established the Family Fairness policy in 1987, then expanded it in 1990 to target as many as 1.5 million people—approximately 40% of the undocumented population—for relief and work authorization. U.S. Br. 64. The policy here is strikingly similar. Respondents note (Br. 54 n.43) that only 47,000 obtained relief under that policy—but Congress swiftly enacted a program that granted lawful status to the same aliens and *approved the policy's ongoing operation in the interim.* IMMACT § 301(g), 104 Stat. 5030. Respondents contend (Br. 55) that Congress did not thereby "ratif[y] a claimed Executive authority to grant broader relief unilaterally." But the Guidance is materially identical. Under both policies, individuals are informed of a non-binding and temporary reprieve, may apply for work authorization, and in turn may participate in Title II Social Security. See J.A. 213-215 (forbearance and work authorization); see also 42 U.S.C. 405(c)(2)(B) (1988); 20 C.F.R. 422.104(b) and (c) (1990) (Social Security).

c. Respondents' suggest (Br. 58) that the Secretary can grant work authorization only to "small" deferred-

action categories, contending that the INS "justified its deferred-action regulation based on the miniscule number of work authorizations it would allow." That is misleading, as the INS was not referring specifically to deferred action. When the INS recodified *all* of its work-authorization regulations in 1987, it mentioned that "the total number of aliens authorized to accept employment is quite small and the impact on the labor market is minimal" to rebut an argument that it was circumventing the INA's labor-certification provisions by not "keep[ing] statistical records of the number of aliens permitted to work" under those regulations. 52 Fed. Reg. at 46,092.

That statement should be read in context. Even at the time, the INS clearly issued work authorization in significant numbers to categories not expressly identified by the INA as work-eligible. In 1987, applicants for adjustment of status or asylum obtained work authorization solely by regulation. 8 C.F.R. 274a.12(c)(8) and (9) (1988). In 1986, 225,598 aliens adjusted status and 81,017 applied for asylum. INS, *1986 Statistical Yearbook of the Immigration and Naturalization Service*, Tbls. 6, 20, at 14, 41 (1987). In 1987, the INS announced a policy to accord EVD and work authorization to between 150,000 and 200,000 Nicaraguans. J.A. 210. In 1990, the INS expanded the Family Fairness policy to target a group of as many as 1.5 million for EVD and work authorization. J.A. 65, 213-215. Congress responded by ratifying that policy—and amending Section 1324a without constraining the Secretary's discretion to authorize work. U.S. Br. 57.

From 2008 through 2014, DHS issued or renewed 3.4 million work authorizations (averaging 485,000

annually) to aliens who had filed applications for adjustment of status, without specific statutory authorization for that category. See USCIS, *I-765 Approvals, Denials, Pending by Class Preference and Reason for Filing* (Feb. 6, 2015) (C9 category).[4] The Secretary's discretion to authorize work by aliens thus is not limited to "small" absolute numbers.

d. Respondents seek (Br. 59) to explain away this consistent historical practice on the theory that the INS was simply creating "bridges from one legal status to another." But they cite no statutory provision making that a prerequisite to the exercise of discretion or granting of work authorization. Many uses of deferred action, EVD, and DED have been not as "bridges," but "for humanitarian reasons." *AADC*, 525 U.S. at 484; U.S. Br. 5-7; J.A. 209-212. And all of those uses enabled aliens to work lawfully.

In any event, DAPA itself is a "bridge" for parents who, with or without deferred action, already have an existing statutory path to lawful status through obtaining favored "immediate relative" visas. See U.S. Br. 46. At that point, parents who overstayed after a lawful entry may adjust to lawful permanent resident status, without more. See 8 U.S.C. 1255(a) and (c)(2). Those who entered unlawfully may be admitted as lawful permanent residents after departing and remaining abroad (unless a waiver is available) ten years. 8 U.S.C. 1182(a)(9)(B)(i), (ii), and (v). Estimates are that "[n]early half" of the unauthorized population overstayed. Pew Hispanic Ctr., *Modes of*

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[4] Some Nicaraguan and Haitian applicants have specific statutory authorization for work. See Resps. Br. 8 & n.4. In 2013, only 200 people adjusted status under those provisions. DHS, *2013 Yearbook of Immigration Statistics*, Tbl. 6, at 18 (Aug. 2014).

*Entry for the Unauthorized Migrant Population* 1 (May 22, 2006). These paths "take[] time," and DAPA provides "a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period." J.A. 93-94.

In short, the Guidance oversteps no limit—justiciable or otherwise—on the Secretary's authority under the INA. The choice of which lowest-priority aliens warrant deferred action is committed to his discretion by law, as respondents concede. He similarly has the authority under Sections 1103(a) and 1324a(h)(3) to issue work authorization to every such alien with economic need. 8 C.F.R. 274a.12(c)(14).

## V. THE GUIDANCE IS EXEMPT FROM NOTICE-AND-COMMENT REQUIREMENTS

The Guidance is a general statement of agency policy exempt from notice-and-comment requirements because it "advise[s] the public prospectively of the manner in which [DHS] proposes to exercise a discretionary power," *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (1947)), namely, to defer action. See *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 252 (D.C. Cir. 2014) (Kavanaugh, J.). Respondents do not dispute that the Guidance satisfies this Court's straightforward test. See U.S. Br. 65-68.

A. Respondents instead propose different tests. They first argue (Br. 60-66) that the Guidance must go through notice and comment because it supposedly binds the discretion of individual DHS agents. But that is backwards. "Indeed, a central purpose of general policy statements is to permit the agency head to direct the implementation of agency policy by lower-

level officials," as they help ensure that individual agents' actions are not arbitrary or capricious. Admin. Law Scholars Amicus Br. 4; see *id.* at 8-17. Respondents' test, by contrast, would "drive agency policy-making out of public view," and lead to less oversight of agency action. *Id.* at 16.

In any event, DAPA does not "bind" DHS agents to accord deferred action to anyone. DHS agents must deny a deferred-action request—even when every other criterion is satisfied—unless the alien "present[s] no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Pet. App. 417a; see *id.* at 419a ("[T]he ultimate judgment" is "determined on a case-by-case basis."). Respondents view these express prerequisites to deferred action as pretextual. But because DAPA can be validly applied even under respondents' test, and in light of the strong presumption of official regularity, it is improper to enjoin DAPA where it "has yet to be implemented." *Id.* at 131a (King, J., dissenting); see *id.* at 234a-241a (Higginson, J., dissenting).

B. Respondents also argue (Br. 66-67) that notice and comment is required because the Guidance has consequences "affect[ing] individual rights." Most exercises of discretion not to enforce a law against someone affect that person's rights in some sense. But that does not give a rule "the force and effect of law"—*i.e.*, create rights and obligations—which is what characterizes a substantive rule requiring notice and comment. *Chrysler Corp.*, 441 U.S. at 302 n.31; see Admin. Law Scholars Amicus Br. 17-19. Indeed, the APA expressly provides that a "statement of policy" may "affect[] a member of the public" and be "relied on, used, or cited as precedent by an agency

against a party," so long as it was made publicly available or there was actual notice, as occurred here. 5 U.S.C. 552(a)(2). Myriad policies similar to the Guidance have been established without notice-and-comment procedures. See U.S. Br. 69-71. Respondents rely (Br. 61-62) on *Morton* v. *Ruiz*, 415 U.S. 199 (1974), but the APA's notice-and-comment provisions "were not at issue in *Ruiz*." *Vigil*, 508 U.S. at 199. Rather, the Bureau of Indian Affairs had failed to comply with its own, more rigorous notice requirement. *Ibid.*; see *Ruiz*, 415 U.S. at 233-234.

More fundamentally, any notice-and-comment requirements have already been satisfied for deferred action's consequences: Duly-promulgated regulations provide that *all* aliens with deferred action may apply for work authorization based on economic need and receive Social Security benefits, if they have earned them and are otherwise eligible. 8 C.F.R. 1.3(a)(4)(vi), 274a.12(c)(14).[5] Accordingly, unlike the agency action in *Ruiz*, the Guidance does not establish eligibility criteria for the applicability of those provisions: Those criteria were already established via preexisting regulations adopted through notice-and-comment rulemaking.

## VI. THE TAKE CARE CLAUSE PROVIDES NO BASIS FOR RELIEF

A. Respondents' "Take Care" argument is meritless. They insist (Br. 71) that it "is distinct from

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[5] DHS's interpretations of "lawful presence" for purposes of tolling and Social Security are exempt from notice-and-comment requirements as interpretative rules. See 5 U.S.C. 553(b)(A). The Social Security rule also falls squarely within the "benefits" exception. 5 U.S.C. 553(a)(2).

[their] statutory arguments," but their arguments are one and the same: They argue that the Guidance "violates explicit as well as implicit congressional objectives" (Br. 75); it is "[a] 'complete abdication' of lawful-presence and work-authorization statutes" (*ibid.*); and it "seeks to make unlawful presence lawful" (Br. 73). Either the Guidance is within the Secretary's statutory authority or it is not.

Action by the Judiciary to enjoin the Executive on the basis of the Take Care Clause would, however, raise grave structural concerns about the relationship between the two Branches. This Court has never viewed the Clause as an appropriate subject for judicial intervention. *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1867). Respondents downplay (Br. 71-72) these concerns, arguing that their claim is directed at the Secretary, not the President himself. But the Constitution assigns the responsibility to "take Care that the Laws be faithfully executed" to the President—not the courts. U.S. Const. Art. II, § 3, Cl. 5. In *Johnson*, Mississippi challenged the execution of the Reconstruction Acts by the President *and* a subordinate—and this Court dismissed the suit in its entirety. See 71 U.S. at 497-498.

Respondents point (Br. 71-77) to *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), but the government (unsuccessfully) invoked the Take Care Clause in defense as an affirmative source of authority for the President's action. *Id.* at 587. *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Peters) 524 (1838), is also inapposite. That case involved a "purely ministerial" duty subject to "no discretion whatever." *Id.* at 613. The President did not assert power to

dispense with that statute; "such power was disclaimed." *Ibid.* So too here.

B. In all events, the Secretary *is* faithfully enforcing the immigration laws. U.S. Br. 43-47, 74-75. Respondents contend (Br. 74) that, if the government prevails, future Presidents could abandon enforcement of "environmental laws, or the Voting Rights Act," or other laws. But those hypotheticals are far removed. The Secretary is vigorously enforcing the immigration laws, and the Guidance helps focus *more* resources on Congress's chosen priorities. Moreover, the Executive has unusually broad discretion in immigration; few other areas involve status offenses where the exercise of discretion unavoidably tolerates an ongoing violation; none has such a well-established tradition, ratified by Congress, of notifying large groups of non-binding, temporary reprieves; and deferred action's consequences flow from immigration-specific laws.

In the end, the Secretary asserts only that he is acting within the immigration laws. He is not attempting to declare lawful conduct that Congress has made unlawful. And whether the Secretary has correctly interpreted the immigration laws presents a straightforward statutory question, not cause for a constitutional confrontation.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
*Solicitor General*

APRIL 2016